Supreme Court, U.S.
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No. 93-639

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

On Writ Of Certiorari To The Florida First District Court Of Appeal

REPLY BRIEF OF PETITIONER

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PETITIONER'S REPLY BRIEF

REPLY TO RESPONDENT'S STATEMENT OF ISSUE AND STATEMENT OF THE CASE

Introduction

In its Response Brief, the issue presented for review (pg. i) by the Board of Accounting, is a significant departure from the Board's statement of the issue in its Brief in Opposition to the Petition for Writ of Certiorari. The points argued by the Board, as discussed below, reflect these last minute modifications in the Board's position.

A. The Board Argues That Petitioner Is an Employee of a Firm That Is Not Licensed as a CPA Firm

In the Board's brief, the Board argues that its sole justification for restricting Petitioner's First Amendment rights, is that she is practicing public accounting in an unlicensed CPA firm. Specifically the Board argues that –

> " . . . it is only her refusal to comply with these requirements, such as licensing her firm with the Board, that compels the restriction of her use of the CPA designation." pp. 18-19

Although Petitioner was originally charged with failure to license her law firm as a CPA firm, the Board voluntarily dismissed[1] this charge, just days before the disciplinary hearing, see paragraph 22 at JA-170. The Board has acknowledged this in its decision, when it says at footnote 7 at JA-185, that Petitioner *"could have simply*

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[1] At the conclusion of the disciplinary hearing, the hearing officer found, at paragraph 23, JA-171: **"Due to DPR's withdrawal of the charges in Count I,. . . . it must be concluded that Ibanez could not be held *in this proceeding* to have violated those statutory provisions which were withdrawn."** [emphasis supplied]

been charged" for not licensing her law firm. (emphasis supplied) Instead she was charged under the Board's deceptive advertising provisions, merely due to her truthful disclosure of her earned CPA and CFP credentials after her individual name.

Petitioner's CPA certificate, copy at JA-3, does not require her to work in a licensed CPA firm, as a prerequisite to append CPA after her individual name. The language of the Board-conferred certificate is unequivocal:

> "Silvia Safille Ibanez has passed all examinations and has met all of the other requirements prescribed by law and by the rules of this Board for qualification as an expert public accountant and is therefore, *entitled to append the letters C.P.A. after this registrant's name to evidence registration by this Board as a CERTIFIED PUBLIC ACCOUNTANT."* [emphasis supplied]

Thus, the charge that the Board voluntarily dropped, has now become the driving force behind the Board's justification for violating Petitioner's First Amendment rights. The Board cannot belatedly add to the charges against Petitioner, either directly or indirectly. To do so, would violate her rights to due process.

Furthermore, the Board has failed to demonstrate how Petitioner's individual use of the CPA credential is inherently misleading, simply because her law firm is not licensed as a CPA firm.

B. The Board Has Utilized the Term "HOLDING OUT"[2] and Has Characterized Petitioner's Testimony in Order to Confuse the Issue before the Court

In its brief, the Board argues that Petitioner's testimony, particularly from the "holding out" rule challenge

[2] Indeed, in Footnote 4 of its Order, the Board acknowledged that the "holding out" rule was not operative and was not being used to discipline Ibanez. JA-182.

proceedings, in some way refutes her right to be considered a CPA in good standing.

Yet, the Board has misstated parts of Petitioner's testimony. For example, at page 17 of the Brief, the Board says that "Ibanez stated that the Board has no jurisdiction over her." [citing R-182 of the rule challenge proceeding]. However, the record is clear that, at R-182, Ibanez testified that, as a licensed CPA, she is subject to Chapter 473 Florida Statutes.

The rule challenge proceedings, reported at R-377 to R-700, focused exclusively on the validity of the "holding out" rule, and in the process many of the Board's rules were questioned, explored and analyzed. During these proceedings, not only Petitioner, but also expert witness Professor John E. Sullivan,[3] were asked numerous questions about jurisdiction of the Board, "holding out", exclusion rules, interpretations of the various Board official opinions on "holding out", etc.

Clearly, the Board's characterizations of Petitioner's opinions are no justification for her punishment. Instead, her opinions are being used by the Board as a pretext to explain the Board's suppression of Petitioner's First Amendment rights. This explains why the Board doggedly persists in using the term "holding out" [pages 7, 13, 14, 16 and others] to deny Ibanez her commercial speech rights in disclosing to the public, truthful, objectively verifiable, non-coercive biographical information.

It must be emphasized that the hearing officer issued a FINAL ORDER [reprinted at JA-116] invalidating the Board's holding out rule.[4] Although the Board initially

[3] Refer to Rule Challenge Transcript at R-510 to R-574.

[4] At JA-133, the Final Order of the hearing officer explains how the Board used the "holding out" rule: **"The rule has actually subjected CPAs, and specifically Petitioner (Ibanez'**

appealed the Final Order, the Board subsequently dismissed this appeal. Thus removing the "holding out rule" from this controversy.

The Board's self-serving interpretations of Petitioner's opinions about Florida law are not the proper focus of this disciplinary inquiry or of this appeal.

C. The Board Argues That Petitioner Refuses To Be Bound to the Board's Jurisdiction

In essence, the Board has punished Petitioner for anticipatory conduct. The Board apparently anticipates that, based on Petitioner's beliefs about the Board's jurisdiction over law firms, that she may engage in some prohibited conduct under Chapter 473 Florida Statutes, in the future. The Board's use of hypotheticals, is proof positive that the Board's decision is based on speculation. The First Amendment does not permit the suppression of free speech based on total speculation.

D. The Board Argues that Petitioner Conceded that The Board Has a Substantial Interest to Regulate the Practice of Public Accounting

The Board argues that Petitioner has concede in her Amended Initial Brief filed in the First District Court of Appeal, that there is a substantial government interest in regulating the practice of public accounting. Although the Petitioner does agree that, generally speaking, the regulation of the practice of public accounting is a substantial interest, this does not mean that the Board can

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and intervenor Brewster, to DPR disciplinary proceedings independent of any other act or wrongdoing merely for any 'publication' of the CPA credential . . . The rule may automatically subject attorney-CPA licensees to DPR disciplinary proceedings . . . merely on the basis of passive, truthful communications . . . "

use this general interest to justify the blanket suppression of Petitioner's First Amendment rights.

CONCLUSION

The pivotal question in this case is whether the Board of Accountancy has violated Ibanez' First amendment rights due to its censure of her truthful disclosure of her CPA and CFP credentials in attorney advertising. The Board is attempting to divert the Court's attention from this central issue, and to turn it into a regulatory jurisdiction issue. However, the record is clear that the Board prosecuted Ibanez, a CPA licensee in good standing, to suppress her commercial speech rights, alleging that Petitioner's use of CPA and CFP, in attorney advertising, is inherently misleading. It is not.

Accordingly, the judgment and order of the First District Court of Appeal of the State of Florida should be reversed.

Respectfully submitted,

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